INDEX

	Page
OPINIONS BELOW	2
JURISDICTION	2
QUESTIONS PRESENTED	2
CONSTITUTIONAL PROVISIONS	3
STATEMENT OF THE CASE	3
STATEMENT OF THE FACTS	4
REASONS FOR GRANTING THE WRIT	4
CONCLUSION	9
CERTIFICATE OF SERVICE	10

INDEX TO APPENDIX

		Page
Appendix A	Opinion of 5th Circuit	App. 1-12
Appendix B	Denial of Rehearing	App. 13-14
Appendix C	Judgment and Commitment	App. 15-16
Appendix D	Brief of Appellant	App. 17-28
Appendix E	Appellant's Petition for Rehearing	App. 29-36

CITATIONS

Case	Page
Barton v. U.S., 263 F2 894, 898 (5th Cir. 1959)	App. 25
Davis v. U.S., 357 F2 348, 441 (5th Cir. 1966)	App. 23
Davis v. Wainwright, 429 F2 1240 (5th Cir. 1970)	App. 24
De Luna v. U.S., 308 F.2d 140 (5th Cir. 1962)	5, App 19, 25
Garcia v. U.S., 315 F2 113, 137 (5th Cir. 1965)	App. 24
Schaffer v. U.S., 221 F2 17, 19 (5th Cir. 1955)	App. 25
Smith v. U.S., 385 F2 234, 38 (5th Cir. 1967)	App. 23
Stewart v. U.S., 366 U.S. 1	6 App. 20
U.S. v. Bradley, 455 F.2d 1181 (1st Cir. 1972)	7-8, App. 32
U.S. v. Echles, 352 F2 892, 896 (5th Cir. 1965)	App. 24

CITATIONS (cont.)

Case	Page
U.S. v. Lebron, 222 F2 531, 535 (2nd Cir. 1955)	App 4, 24
U.S. v. Parness, 331 F2 703 (3rd Cir. 1964)	App. 21
U.S. v. Stephens, 449 F.2d 103 (9th Cir. 1971)	8, App. 32
U.S. v. Weber, 437 F2 327, 335 (3rd Cir. 1970)	App. 26
Section 1103(a) of the 1970 Federal Comprehensive Drug Abuse Prevention and Control Act	8
1 U.S.C. Sec. 109	8

in the
Supreme Court
of the
United States

OCTOBER TERM, 1972

NO. _____

AUBREY WAYNE BEAUCHAMP,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner Aubrey Wayne Beauchamp prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on August 17, 1972.

I

OPINIONS BELOW

The Opinion of the Court of Appeals for the Fifth Circuit is found in Appendix A hereof and the order denying rehearing is found in Appendix B hereof.

II

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on August 17, 1972 (Appendix "A", Page 1). Appellant's petition for rehearing was denied on September 7, 1972 (Appendix "B", Page 14). The jurisdiction of this court is invoked under 28 U.S.C. §1254(1).

III

QUESTIONS PRESENTED

1. Whether the opinion of the Fifth Circuit correctly interpreted the burden placed upon the Appellant by the limitations restricting Appellant's counsel in closing argument from commenting on the fact that Appellant had taken the witness stand in his own behalf, Appellant's counsel having been cautioned that his responsibility to refrain from comment or inference concerning the failure of Appellant's Co-Defendants to take the stand themselves.

2. Whether the opinion of the Fifth Circuit affirming the District Court's interpretation respecting the applicability of the 1970 Federal Comprehensive Drug Abuse Prevention and Control Act was a correct interpretation of the law as applied to the factual situation of the instant case.

IV

CONSTITUTIONAL PROVISIONS

I. United States Constitution, Fifth Amendment relative to this Appellant's deprivation of fair trial and competent representation because of the restrictions placed on this Appellant, arising out of the Fifth Amendment rights accruing to this Appellant's Co-Defendants at trial.

II. United States Constitution, Fourteenth Amendment, Section 1, as it shall apply to the right of citizens to equal protection under the laws.

V

STATEMENT OF THE CASE

Petitioner is charged together with PETER JOHN MILISCI, TOM CORBETT, PAUL WESCOTT KLINE, and ROYCE LEE BRINSON in an indictment dated April 16, 1971, by an information filed by the office of the United States Attorney, in and for the Fifth Circuit, Southern District of Florida. The offense charged was a violation of 21 U.S.C. §176(A), defined as the conspiring to import narcotic drugs into the United States contrary to law. Thereafter, jury trial was had in the District Court of the United States, for the Southern District of Florida, before the Honorable James L. King, said trial beginning on June 30, 1971, and continuing through July 2, 1971, when a verdict of guilty was returned by the jury.

Thereafter, Petitioner here, moved the lower court for a retrial of the cause and said motion being denied, Petitioner took his appeal to the United States Court of Appeals for the Fifth Circuit, and upon oral argument and the Appellant's brief, the lower court verdict and sentencing was affirmed and thereafter, this Petitioner, having moved for a rehearing in the United States Court of Appeals for the Fifth Circuit, and said rehearing having been denied, Petitioner files this his Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

VI

STATEMENT OF THE FACTS

AUBREY WAYNE BEAUCHAMP, the Petitioner in the action now on appeal is referred to herein as Petitioner Beauchamp.

Petitioner Beauchamp was indicted April 16, 1971 by an information filed by the office of the United States Attorney in and for the Fifth Circuit, Southern District of Florida. The offense charged was a violation of 21 U.S.C. §176(A) defined as the conspiring to import narcotic drugs into the United States contrary to law.

Petitioner Beauchamp entered a plea of not guilty and thereafter a jury trial was had on June 30, 1971 in the Federal Courthouse, Miami, Florida, before the Honorable James L. King, Federal District Court judge. Petitioner Beauchamp was tried as a co-defendant with four

other defendants, all being charged with violation 21 U.S.C. §176(A). The Petitioner Beauchamp had no prior records of criminal conviction and at least one of the other co-defendants was on probation at the time of the trial.

During the course of the trial, the Petitioner Beauchamp moved for severance of his trial (R. 7), and Petitioner Beauchamp's attorney, not court appointed, moved by timely motion for a directed verdict (R. 447).

Upon completion of the government's case and the court's denial of motions made by the several defendants (R. 462), Petitioner Beauchamp took the stand in his own behalf (R. 484).

Petitioner Beauchamp testified as to his relationships to the parties involved and explained his acts and his lack of criminal intent (R. 484-529). Mr. Harold Keefe, Assistant U.S. Attorney, cross-examined Petitioner Beauchamp (R. 529-546).

No other defendant chose to testify and the judge, again denying motions for a severance, directed that closing arguments be submitted to the jury, first cautioning Petitioner Beauchamp's attorney as to the limitations of the scope of the defendant's closing argument. Petitioner Beauchamp was placed under the same limitation as a prosecutor based upon the District Court Judge's interpretation of **De Luna v. U.S.**, 308 F.2d 140 (5th Cir. 1962). (R. 560-573). Closing arguments were heard, the jury was charged, and returned a verdict of guilty against all the defendants (R. 582-583).

VII

REASONS FOR GRANTING THE WRIT

I.

The constitutional rights of the four co-defendants of the Petitioner so far as those rights under the Fifth Amendment apply to restraint from comment on a defendant's failure to take the witness stand in his own defense, so prejudiced the Petitioner after he had in fact taken the witness stand in his own defense, that the Petitioner's constitutional right to a fair trial was denied him.

The Appellate Court failed to comprehend the Petitioner's right to make expeditious use of the fact that Petitioner had in fact testified in his own behalf.

It is well established that there can be no comment or argument about a defendant's failure to take the stand. **Stewart v. U.S.**, 366 U.S. 1. A defendant's failure to request to be a competent witness shall not create a presumption against him, 18 U.S.C. §3481.

The United States Constitution does not seek to decree every right an American citizen may enjoy, but rather simply tends to prepare guide lines pertaining to the limitations placed on citizens.

The Lower Court construed, and the appellate court affirmed that which Petitioner cannot disagree with, to-wit; the Petitioner's co-defendants had the absolute right not to testify at their trial.

The contention of the Petitioner is that a co-defendant's absolute right under the United States Constitution shall not be construed to deny Petitioner's absolute right to a fair trial under the same Constitution.

Petitioner does not contend that the only definition of a fair trial is that trial wherein Petitioner is found not guilty; Petitioner simply contends that he has that absolute right to make use of every inference that may influence the jury of his peers to find him not guilty.

Because the protection of Petitioner's co-defendant's constitutional rights to refrain from testifying on their own behalf, prohibited Petitioner from commenting on the fact that Petitioner had taken the stand on his own behalf. Petitioner's right to fair trial was abridged and Petitioner's motion for severance frequently made during the course of the trial, should have been granted.

II.

The Petitioner contends that the lower court misinterpreted the impact of the new Federal Drug Abuse Act, in that the trial court in sentencing the Petitioner, felt that it did not have the discretionary right to sentence under the new Act, which allows for sentencing of less than five years, whereas the court, sentencing Petitioner under the basis of the Code Provision cited in the indictment, indicated that it had no discretion to impose a sentence of less than five years in the Federal Penitentiary, without benefit of probation or parole. The United States Supreme Court has granted certiorari in **U.S. v. Bradley**, 455 F.2d 1181 (1st Cir. 1972), where the question will shortly be

decided whether or not the lesser sentence may be imposed notwithstanding an adjudication or verdict of guilt based on an indictment for a violation of the earlier law. The instant case and **Bradley** are so close akin that the Petitioner is disposed to consider that the United States Supreme Court decision in **Bradley** will be strongly persuasive here.

Petitioner's position is that prosecution commences with indictment and concludes with judgment and sentence. Section 1103(a) of the 1970 Act and 1 U.S.C. Sec. 109 clearly deny Appellants due process and equal protection of the laws guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution. Moreover, the facts instanter, are almost identical with those in **U.S. v. Stephens**, 449 F.2d 103 (9th Cir. 1971).

CONCLUSION

For the foregoing reasons and authorities, a Writ of Certiorari should issue to review the judgment and opinion of the Fifth Circuit.

Respectfully submitted,

EDWARD C. SAWYER
Attorney at Law
3480 Main Highway
Coconut Grove
Miami, Florida 33133

Attorney for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that three copies hereof were delivered to the Solicitor General, Department of Justice, Washington, D.C. 20530 this 6 day of October, 1972.

_____

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 71-2577

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

PETER JOHN MILISCI, TOM CORBETT, PAUL WESCOTT KLINE, AUBREY WAYNE BEAUCHAMP and ROYCE LEE BRINSON,
Defendants-Appellants.

Appeals from the United States District Court
for the Southern District of Florida

(August 17, 1972)

Before TUTTLE, MORGAN and RONEY,
Circuit Judges.

TUTTLE, Circuit Judge: The defendants in this case were convicted of a conspiracy to import large amounts of marijuana into the United States in violation of 21 U.S.C.A.(a). Six of the original seven defendants have appealed their conviction and sentences. The remaining defendant, one Rosentrouch, originally charged as a conspirator, entered a plea of guilty to a lesser offense and his indictment was dismissed. He was one of the principal witnesses at the trial of the remaining 6.

Nowhere in the briefs filed by the appellants nor in the government's briefs is there a clear statement of the facts which were brought out during the trial of the case. In view of the fact that all of the defendants contended that there was a failure of proof by the government of the facts essential to establish a conspiracy to the satisfaction of the jury beyond a reasonable doubt, the appellants' brief were deficient in that they did not undertake to state the facts actually proved as against themselves in the light most favorable to the government. Nor, in turn, did the government, in its very abbreviated brief, undertake to list precisely, the evidence in this 600 page record which, under its theory of the case, precisely pointed to the involvement of each of the six individuals. This has made it necessary for the court to read carefully every page of the transcript of the evidence in the case.

Having carefully read the testimony of all the witnesses and having considered all of the motions for exclusion of testimony and the rulings of the trial court, we state briefly the facts with respect to each group of defendants.

On or about February 11, 1971, the alleged date of the commencement of the conspiracy, Peter John Milisci and Royce Brinson met with special agent, Rogue of the United States Bureau of Narcotics, not knowing that Rogue was other than the owner of a boat which they wished to engage. At this meeting Brinson and Milisci told Rogue that they wanted to charter a boat capable of carrying approximately one and a half tons of marijuana from Jamaica to the United States. As a result of this meeting, they did, indeed, charter a motor vessel—the Cayman Pilot—which was berthed at Grand Cayman Island, for

the purpose of transporting the drug. It would be necessary for them to fly to Grand Cayman Island in order to pick up the vessel, a fishing boat of some 52 feet in length.

On February 13, 1971, Tom Corbett, Aubrey Wayne Beauchamp and Paul Wescott Kline met with Rogue at Miami International Airport and flew to Grand Cayman Island. Brinson flew over separately. The record does not disclose that the funds for this flight were furnished from government sources. However, it is clear that Rogue had arranged for them to get in touch with a friend of his named Bethel, known as a "cooperating individual", who was not paid for his services by the government but who was furnished with the funds necessary for him to acquire the motor vessel from its owner for the proposed trip. The group stayed with Bethel during the evening and night of February 13th and on February 14th, the group, excluding Brinson, boarded the motor vessel at Grant Cayman Island and proceeded to Jamaica. They expected Brinson to be in Jamaica at their arrival.

Evidence that could be believed by the jury was to the effect that Bethel, although considered as the captain, appeared not to be familiar with the waters in the vicinity of Jamaica towards which the group was headed, but that Beauchamp produced charts covering the area of the trip and that he and Bethel poured over the charts and charted the course to the vicinity of a marked spot at Jamaica. There is ample evidence that during several conversations while aboard the vessel, Corbett, Beauchamp and Kline all discussed the objective of the trip and each of them stated some reason as to why he was involved in this kind of a scheme. Corbett was apparently sick during much of the trip and was not as much in evidence as the other

members of the party. However, there was testimony that he discussed the project on several different occasions. Also, there was testimony that he was present at an apartment the night before they flew to the Islands together with Kline and Brinson and Milisci who "were talking and giving me [Rosentrouch] the details on the boat, and they said that the boat was docked in Grand Cayman Island, and they would have to fly—that whoever was going on the boat was going to fly there and proceed from Grand Cayman Islands to Jamaica".

In brief, our reading of the record makes it plain that there was ample evidence from which the jury could conclude that beginning on February 11th a conspiracy existed among all of the six named appellants substantially as charged in the indictment. In order not to leave the story incomplete we add the following: The Cayman Pilot attempted to make contact at night with the ground party at Jamaica, but the crew were unable to raise any one by walkie talkie instruments. The vessel ran aground, was refloated, and limped back to Grand Cayman Island. The government, through Rogue and Bethel, paid the owner of the boat $2000 for charter hire and some $600 for repairs. The conspirators flew home without any contraband.

Although what we have heretofore said makes clear that we have concluded that there was sufficient evidence to establish the existence of the conspiracy, and we also state that there was ample evidence to prove several of the alleged overt acts, the appellants all complain here, as they did in the trial court, that testimony received from Rosentrouch included evidence concerning efforts made by Rosentrouch and Milisci to set up the trip to Jamaica

some weeks before the alleged commencement of this conspiracy on February 11th. Although the trial court ruled out testimony by government agent Prevette, relating to a good many transactions and discussions between Rosentrouch, Rogue and Milisci that occurred in connection with an abortive effort to complete the trip earlier, the trial court, properly we think, permitted to stand substantial evidence relating to the initial effort by Rosentrouch to set up a plan involving the use of a boat and its essential crew necessary to carry out the illegal importation of marijuana into the United States. The record discloses that the first boat obtained as a result of the payment by Rosentrouch of the sum of $3,000 to Milisci ran into difficulties and the trip was never completed. However, Rosentrouch and Milisci pursued the matter with Rogue, the undercover agent, who then made the final arrangements to obtain the Cayman Pilot from Bethel on February 14th, the boat on which the alleged conspirators did actually embark and proceed to Jamaica.

Appellants strongly urge that the aborted effort that occurred prior to February 11th was an entirely different conspiracy, and any evidence relating to it was immaterial and irrelevant to the conspiracy charged and, of course, was highly prejudicial. Undoubtedly it was prejudicial, but also, undoubtedly, it was relevant for the government to show the efforts which Rosentrouch and Milisci, the original conspirators, were engaging in in trying to work up a final group which could effectuate their plan. The fact that the conspiracy involving all persons who were finally tried, finally brought together all of them on February 11th or 12th, does not mean that it is improper for the government to prove the steps that had to be taken by some of the conspirators in bringing the final group

together to enter into the conspiracy "on or about February 11th." We find no error in the admission of evidence relating to the acts that occurred prior to that date.

We do not place this on the basis that the principle that when the terminology "on or about" is used the court may permit proof of occurrences within as much as "several weeks" of the date stated, cf. Kokotan v. United States, 10 Cir., 1969, 408 F.2d 1134, and United States v. Antonelli, 1st Cir., 1971, 439 F.2d 1068, but rather on the fact that the existence of a conspiracy on or about February 11th may be proved by showing the actions of the person who later perfected the conspiracy leading up to the date on which the conspiracy was actually formed. We think it clear that the jury could believe, under Rosentrouch's testimony, that he had involved Milisci, who had in turn involved the others in a plan to organize a group just as soon as they could be assembled to carry out the purpose of causing the importation of a large amount of marijuana from Jamaica into the United States, and that this group was finally brought together on February 11th, when the conspiracy was actually effective. In this connection see United States v. Fassler, 9 Cir., 1970, 434 F.2d 161. Of course, also, when the conduct of some of the defendants on board the Cayman Pilot might otherwise be ambiguous, if their testimony was believed, the evidence of the participation by at least one of them in the pre-February 11th efforts is relevant to dispel or explain the ambiguity by showing earlier acts clearly identified with a purpose to bring in a large quantity of marijuana to one of the lower Floriday Keys.

All of the appellants, other than Beauchamp, complain of the failure of the trial court to sever their clients

for separate trials, once it became apparent that Beauchamp was going to urge the defense of entrapment. However, reading the record as carefully as we can, it appears that once the trial court delineated the manner in which Beauchamp would be subject to cross-examination and the limitations placed upon Beauchamp's counsel in commenting on the fact of his testifying as contrasted with the failure of the remaining five defendants to testify, it appears that the arrangement completely satisfied the objections made and the trial court was not faced with a final definite motion for severance. Nevertheless, even though such motions were made and denied by the trial court, we think no prejudicial error resulted by reason of the manner in which it was handled by the trial court.

In a case decided by this court, deLuna v. United States, 5 Cir., 1962, 308 F.2d. 140, this court had to deal with a case in which one of two co-defendants determined that he would take the witness stand, although his co-defendant elected to remain silent. The one who took the witness stand undertook to capitalize on the fact that "he was honest enough and had courage enough to take the stand and subject himself to cross-examination, and tell you the whole story . . . You haven't heard a word from this man [the other defendant]." On three occasions during counsel's argument, this same theme was stressed by counsel for the witness. Under such circumstances, this court held that it was impossible for the trial court to erase from the jury's mind this damaging contrast between the "honest witness" who took the stand, and the silent witnesses who were thus cast in the role of being unwilling to tell the truth, and the court reversed the conviction of the non-testifying witness.

In the present case the trial court, after discussion with all counsel, made it plain that in argument to the jury, Beauchamp's testifying could not be contrasted to the failure of the other defendants not to testify. The rights of the other defendants were adequately protected in this manner, and they do not have the complaint that caused the court in deLuna to reverse the conviction of the non-testifying witness.

However, in the present case Beauchamp's counsel objects to the proposition that he was unduly restricted in his argument to the jury. He does not dispute the proposition that it is well established that there could be no comment or argument about a defendant's failure to take the stand. Stewart v. U.S., 366 U.S. 1. In fact appellant Beauchamp's brief states: "The defendant Beauchamp does not argue against the reasonableness of the limitation placed upon him which prohibited him from making direct comments concerning his co-defendants' failure to take the witness stand." He argues that "he was denied the opportunity to draw reasonable inferences from the fact that he did testify in his own behalf, and he contends that said denial resulted in prejudice to his case. Defendant Beauchamp was denied the opportunity to make full comment upon the evidence as a result of the district court's imposition of stringent requirements and limitations which prevented him from effectively confronting the jury with the argument that he did exercise his right to take the stand."

As we read the record, following considerable colloquy, the trial court's limitations made it permissible for counsel to argue to the jury that Beauchamp testified as a witness and they were to be the judges of his demeanor

and the truth or falsity of his testimony as a witness. The court merely prohibited counsel from drawing any contrast between Beauchamp's giving testimony and the other defendants failing to do so. We conclude that this fully meets the requirements that the rights of the co-defendants must be balanced by the court in such a situation as this.

Counsel for Brinson, Corbett and Kline complain that their clients' prosecutions were not separated because, once Beauchamp took the stand, they could not honestly cross-examine him lest he be compelled, in order to protect his own interest, to testify in a manner which counsel for the other defendants felt would be giving false testimony. The simplest answer to this is that, as we read this record, we find nothing stated by Beauchamp which in any way inculpates the named defendants. It merely claimed that he was travelling as an innocent passenger on this venture, but he did not make any effort in his testimony to point the finger of blame at either Brinson, Corbett or Kline. Thus no harm could result from the inability of their counsel to cross-examine Beauchamp under the existing ground rules laid down by the court.

Touching on the further ground for appeal, that is that the evidence showed entrapment as a matter of law, we conclude that this cannot be seriously made. The issue was squarely presented to the jury and was rejected.

Among other contentions made by the appellants is the claim that they were improperly sentenced under the statute which was in effect at the time of the commission of their offense, 21 U.S.C.A. §173 and §174, which provided for a five year mandatory minimum prison term;

whereas, effective May 1, 1971, the New Comprehensive Drug Abuse, Prevention and Control Act abolished the minimum mandatory sentence and generally liberalized the penalty provisions, in most instances no longer forbidding suspended sentences, parole or probation. The offense here proved to the satisfaction of the jury occurred prior to the effective date, May 1, 1971, of the new law. However, the trial and sentencing occurred subsequent to May 1, 1971. Appellants contend that they should have been sentenced under the terms of the new law, notwithstanding the general savings statute, 1 U.S.C.A. §109, which reads as follows:

> "The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture or liability."

They contend also that sentencing under the later act is not forbidden by the specific saving provision of Section 1103(a) of the 1970 Act, which provides as follows:

> "Prosecutions for any violations of law occurring prior to the effective date of Section 1101, shall not be affected by the repeals or amendments made by such section or section 1102, or abated by reason thereof."

Appellants rely upon the recent case of United States v. Stephens, 9 Cir., 1971, 449 F.2d 103, which involved a

somewhat similar chronological sequence, and in which the defendants were prosecuted and convicted for violations of 21 U.S.C.A. §176(a), (a section that was repealed by the 1970 Act), and a few days after May 1, 1971, the effective date of the new act, were sentenced to five year sentences, the minimum prescribed by Section 176(a), but they then received suspension of the sentences and each of them was placed on probation for five years. The Court of Appeals for the Ninth Circuit denying mandamus against the trial judge, held that the suspension of sentence and the grant of probation were authorized by the terms of the 1970 Act. The court concluded, after examining the specific and general statutory saving provision that neither preserved the section of the old law which prohibited the granting of probation.

In the meantime, other circuits have decided the case differently. The Court of Appeals for the Second Circuit in United States v. Fiotto, et al., 2 Cir., 1972, ____ F.2d ____, and the First Circuit in United States of America v. Bradley, et al., 1 Cir., 1972, 455 F.2d 1181, held that all sentencing procedures and the time and limitations contained in the repealed sections dealing with convictions for the violations of these narcotic statutes were controlled by the old statute. The Supreme Court denied certiorari in Fiotto, 40 U.S.L.W. 3542; ____ United States ____, but granted certiorari in Bradley, 40 U.S.L.W. 3588, ____ U.S. ____. It thus appears that the Supreme Court is going to give consideration to this precise question.

A perusal of the record indicates that only one of the defendants here received the mandatory minimum sentence of five years, defendant Corbett. Since all of the other defendants received more than the minimum man-

datory sentence, it would appear that only Corbett might possibly have been prejudiced if the trial court had the opportunity to give him something less by way of sentence than the old, now repealed, minimum mandatory five years.

We conclude that we can protect Corbett's interest and still dispose of the case on the merits by affirming the convictions of all of the defendants and affirming the sentences of all, including Corbett's. It is clear that in the event the Supreme Court should reverse the decision of the First and Second Circuits and hold that he was entitled to have been sentenced under the new law, assuming that he has applied for certiorari in this case, the trial court will have the statutory period to modify the sentence after a final disposition of the case on appeal. We have no doubt that the district court will then consider the case as if it were before in ab initio, if the Supreme Court should decide that the sentencing choices of the district court are to be made under the 1970 Act.

We have considered each of the other contentions made on appeal, and find them without merit.

The judgments are AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
OFFICE OF THE CLERK

September 7, 1972

TO ALL PARTIES LISTED BELOW

Re: No. 71-2577—U.S.A. vs. Peter J. Milisci, Tom Corbett, Paul W. Kline, Aubrey W. Beauchamp and Royce Lee Brinson

Gentlemen:

You are hereby advised that the Court has today entered an order* denying the Petition( ) for Rehearing in the above case. No opinion was rendered in connection therewith. See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

EDWARD W. WADSWORTH,
Clerk

By /s/ Alvis M. Winchester
Deputy Clerk

/amw

cc: Mr. Joel Hirschhorn
Mr. Edward C. Sawyer
Mr. Philip J. Mandina
Mr. Albert Lehrer
Mr. Arthur Massey
Mr. Harold F. Keefe
Mr. Royce Brinson
*As to Tom Corbett,
Paul W. Kline,
& Royce L. Brinson

APPENDIX C

JUDGMENT AND COMMITMENT

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA.

#71-184-Cr-JLK

UNITED STATES OF AMERICA,
Plaintiff,

vs.

PETER JOHN MILISCI, ROYCE LEE BRINSON, TOM CORBETT, PAUL WESCOTT KLINE, AUBREY WAYNE BEAUCHAMP,
Defendants.

Rendered July 2, 1971.

On July 2, 1971, came the attorney for the United States Government, and the Defendant in person, and the attorney for the Defendant, EDWARD C. SAWYER, ESQUIRE, upon publication of the verdicts rendered by the jury in the above styled matter, on the day above stated, the Defendant, AUBREY WAYNE BEAUCHAMP, upon his plea of Not Guilty, and a verdict of Guilty by a jury, AUBREY WAYNE BEAUCHAMP is convicted of the offense as charged.

On August 5, 1971, came the attorney for the Government, and the Defendant, AUBREY WAYNE BEAUCHAMP appearing in person, and the Defenant's attorney, EDWARD C. SAWYER, appearing of counsel, it was then and there, in open court adjudged that AUBREY WAYNE BEAUCHAMP be committed to the custody of the Attorney General or his authorized representative, for a period of six (6) years, or until otherwise discharged by due process of law.

It is ordered that the clerk deliver a certified copy of this Judgment and Commitment to the United States Marshall or other qualified officer and that the copy serve as the Commitment of the Defendant.

/s/ James Lawrence King,
United States District Judge.

APPENDIX D

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 71-2577

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

PETER JOHN MILISCI, ROYCE LEE BRINSON, TOM CORBETT, PAUL WESTCOTT KLINE, AUBREY WAYNE BEAUCHAMP a/k/a Jim Bishop,
Defendants-Appellants.

Appeal from the United States District Court for the Southern District of Florida.

BRIEF FOR DEFENDANT-APPELLANT

QUESTIONS ON APPEAL

I

Should a District Court be reversed and a case remanded when severance is denied the one defendant of five defendants who takes the witness stand in his own

behalf, submitting himself to cross-examination and the possibility of rebuttal witnesses and who is thereafter denied the right to direct the jury's attention to the fact that he did take the stand and in fact is burdened with the same requisite silence that governs a prosecutor who may not argue that a defendant did not speak in his own defense?

II

Is it reversible error for a District Court to rely solely on a concurring opinion when citing case law authority, quoting verbatim at length a concurring opinion and never mentioning the majority opinion in the case cited?

STATEMENT OF FACTS

Audrey Wayne Beauchamp, the defendant in the action now on appeal is referred to herein as Defendant Beauchamp.

Defendant Beauchamp was indicted April 16, 1971 by an information filed by the office of the United States Attorney in and for the Fifth Circuit, Southern District of Florida. The offense charged was a violation of 21 U.S.C. § 176 (A) defined as the conspiring to import narcotic drugs into the United States contrary to law.

Defendant Beauchamp entered a plea of not guilty and thereafter a jury trial was had on June 30, 1971 in the Federal Courthouse, Miami, Florida, before the Honorable James L. King, Federal District Court judge. Defendant Beauchamp was tried as a co-defendant with four other defendants, all being charged with violating 21

U.S.C. § 176 (A). The Defendant Beauchamp had no prior criminal record, while two of the co-defendants had prior records of criminal conviction and at least one of the other co-defendants was on probation at the time of the trial.

During the course of the trial, the Defendant Beauchamp moved for severance of his trial (R. 7), and Defendant Beauchamp's attorney, not court appointed, moved by timely motion for a directed verdict (R. 447).

Upon completion of the government's case and the court's denial of motions made by the several defendants (R. 462), Defendant Beauchamp took the stand in his own behalf. (R. 484).

Defendant Beauchamp testified as to his relationships to the parties involved and explained his acts and his lack of criminal intent (R. 484-529). Mr. Harold Keefe, Assistant U. S. Attorney, cross-examined Defendant Beauchamp (R. 529-546).

No other defendant chose to testify and the judge, again denying motions for a severance, directed that closing arguments be submitted to the jury, first cautioning defendant Beauchamp's attorney as to the limitations of the scope of the defendant's closing argument. Defendant Beauchamp was placed under the same limitations as a prosecutor based upon the District Court Judge's interpretation of De Luna v. U.S. 308 F2 140 (5th Cir., 1962). (R. 560-573) Closing arguments were heard, the jury was charged, and returned a verdict of guilty against all the defendants. (R. 582-583).

Defendant Beauchamp moved for a new trial and said motion being denied, was sentenced to six years (R. 5), the offense charged carrying with it a minimum sentence of five years. The said offense now carries a maximum sentence of five years and no mandatory sentence whatsoever.

ARGUMENT

I

A. The scope of the prohibition on commenting upon a co-defendant's failure to testify.

It is well established that there can be no comment or argument about a defendant's failure to take the stand. Stewart v. U.S., 366 U.S. 1. A defendant's failure to request to be a competent witness shall not create any presumption against him, 18 U.S.C. § 3481, the defendant Beauchamp does not argue against the reasonableness of the limitation placed upon him which prohibited him from making direct comments concerning his co-defendant's failure to take the witness stand; the defendant, Beauchamp, does resoundingly protest that he was denied the opportunity to draw reasonable inferences from the fact that he did testify in his own behalf and he contends that said denial resulted in prejudice to his case. Defendant Beauchamp was denied the opportunity to make full comment upon the evidence as a result of the District Court imposition of stringent requirements and limitations which prevented him from effectively confronting the jury with the argument that he did exercise his right to take the stand (R. 563-572).

One of the most effective arguments of defense counsel in a criminal proceeding is an argument based upon the fact that the defendant has taken the stand in his own defense and given honest answers on direct and cross examination. In the case at bar, the District Court refused to allow defendant Beauchamp to assert that ". . . my defendant took the stand, he is honest," (R. 572). The district Court refused to allow this statement to be made because, according to the District Court the defendant Beauchamp was subject to the same limitations and requirements as a prosecutor, and there was doubt that a prosecutor could say that (R. 572).

Defendant Beauchamp contends that this comment would not be prejudicial or an unreasonable inference to his co-defendant's failure to testify. The Third Circuit has held that statements in a co-defendant's summation to the jury that co-defendant did not have to take the stand but nevertheless did so because he had nothing to hide, did not refer to the failure of the defendant to testify directly or by inference and did not violate a silent defendant's constitutional rights. U.S. v. Parness, 331 F2 703 (3rd Cir. 1964). Defendant Beauchamp submits that the effect on a jury of saying he is honest would be no more prejudicial to his silent co-defendants than statements declaring that he had nothing to hide from them. The two phrases seek the same result. Thus, to say one is honest is not an unreasonable inference as to a co-defendant's honesty or lack of honesty, but rather a declaratory statement about the one particular defendant making the statement.

The 5th Circuit in De Luna v. U.S. 308 F2 140 (5th Cir. 1962) held that defense counsel's comments regarding

his client's honesty were prejudicial and in violation of co-defendant's right to remain silent, and, based upon this, a severance should have been granted. However, in De Luna, defense counsel phrased his remarks in such a manner as to infer that the co-defendants were not honest because they did not testify. The defense attorney for Gomez contrasted Gomez' willingness with De Luna's unwillingness to take the stand. De Luna, 143. In the case at bar, defendant Beauchamp did not ask to make inferences from or to contrast the co-defendant's failure to testify, but only to make a reasonable attempt to apprise the jury of the fact that he did take the stand and submit himself to cross-examination as an honest man.

The District Court's interpretation of the De Luna decision was that defendant Beauchamp was subject to the same limitations and requirements as a prosecutor would be, thus prohibiting him from making any comment or inference upon co-defendant's failure to testify (R. 572). This limitation was a severe restriction on the defendant Beauchamp's right to a fair trial because it prevented him from making comments on his taking of the stand.

There is dictum in De Luna at 143 to the effect that a defense attorney should be free to draw all reasonable inferences from the failure of a co-defendant to testify, just as an attorney is free to comment on the effect of any interested party's failure to produce material evidence in his possession or to call witnesses who have knowledge of pertinent facts. Defendant Beauchamp has rights which must be protected no less than if he were prosecuted singly. De Luna 143. The 5th Circuit has since explained De Luna as being applicable to situations in

which a recalcitrant defendant remains silent, and this fact is commented upon. Smith v. U.S., 385 F2 234, 38 (5th Cir. 1967).

If this be the case, that De Luna is applicable to situations where comment is made upon the fact that a defendant has remained silent, then the District Court was bound to sever Beauchamp from co-defendant in order to protect the co-defendant's 5th amendment rights. If the District Court believed that defendant Beauchamp's comment concerning his honesty would be an unfair influence as to co-defendant, then a severance was in order. However, defendant Beauchamp submits that that request to make comment about his honesty would not have been prejudicial, thus it should have been allowed. The District Court's failure to take one of these alternates resulted in prejudice to defendant Beauchamp.

It is important to observe that the rule does not prohibit all comment on testimony or evidence which stands uncontradicted, and the right to make such statement is well established. Davis v. U.S., 357 F2d 348, 441 (5th Cir., 1966.) The District Court's comments to defendant Beauchamp (R. 563-572) effectively limited defendant Beauchamp's opportunity to express the fact to the jury that no one took the stand, for the government or co-defendants, to dispute or contradict what he had to say. The limitations placed on defendant Beauchamp were so stringent that defendant Beauchamp was forced to use guarded language to avoid violating the District Court's admonition. (R. 572). The 5th Circuit has held that even a prosecutor may be allowed to comment upon uncontradicted testimony. A prosecutor's remarks, in closing argument, in attempting to show that nothing had been

adduced on cross examination of the state's witnesses to contradict their testimony was not improper on theory that remarks constituted comment upon failure of the defendant to testify in own behalf. Davis v. Wainwright, 429 F2d 1240 (5th Cir., 1970). The Fifth Circuit has consistently upheld the right of counsel to comment upon uncontradicted evidence in holding that the rule does not go to the extent of forbidding argument of counsel for the prosecution to the effect that evidence against a defendant is uncontradicted. Garcia v. U.S., 315 F2 113, 137 (5th Cir., 1965).

The District Court instructed defendant Beauchamp that he was under the same limitations the government is under (R. 571). However, the District Court, in admonishing defendant Beauchamp (R. 563-572), denied him the latitude that a government prosecutor would be allowed in commenting upon uncontradicted testimony. These instructions (R. 563-572) prejudiced defendant Beauchamp to such an extent that he could not effectively present his case to the jury in closing argumenta.

B. Balancing the Rights of Co-defendants.

The general rule has evolved that persons jointly indicted should be tried together. U.S. v. Echeles, 352 F2 892, 896 (5th Cir. 1965), particularly so where the indictment charges a conspiracy or a crime which may be proved against all the defendants by the same evidence and which results from the same or similar series of acts. U.S. v. Lebron, 222 F2 531, 535 (2d Cir. 1955). Nevertheless, a single joint trial, however desirable from the view of efficient and expeditious criminal adjudicators, may not be had at the expense of a defendant's right to a

fundamentally fair trial. Barton v. U.S., 263 F2 894, 898 (5th Cir., 1959); Schaffer v. U.S., 221 F2 17, 19 (5th Cir., 1955). Though the federal courts adhere to the discretionary rule (Rule 14 FRCP), they must nonetheless be alert to accord any defendant a completely fair trial. Barton, 898.

There was much discussion in the district court regarding the 5th Circuit's opinion (R. 561-67) in De Luna v. U.S. 308 F2, 140 (5th Cir., 1962); resulting in the District Court instructing defendant Beauchamp as to his comments to the jury based upon the concurring opinion. Defendant Beauchamp respectively submits that the District Court's interpretation of the De Luna case prejudiced his rights as opposed to protecting the rights of co-defendant. This is not the spirit of the De Luna decision wherein Judge Bell reserves the right of a defendant to take the stand under § 18 U.S.C. 3481 and to a full and fair defense. At page 155, Judge Bell states that:

> These rights must be balanced by the court whose duty it is to see that a fair trial is afforded while at the same time protecting all rights . . . It was proper in the defense of Gomez for his counsel to comment upon the fact that he had taken the stand . . .
>
> De Luna

A defendant in a criminal trial has the right to declare himself a competent witness to testify in his own behalf. 18 U.S.C. 3481. It is clear that once a defendant takes the stand, he waives his 5th Amendment

privilege and makes himself liable to cross-examination as an ordinary witness. U.S. v. Weber, 437 F2 327, 335 (3rd Cir., 1970).

If a defendant exercises this privilege, he should be allowed to make this point clear to the jury that he did not have to take the stand. In a joint trial, it is conceivable that a co-defendant who takes the stand, and comments upon this fact to the jury, may prejudice the jury as to the other co-defendant who did not take the stand. It is for this reason that Rule 14 FRCP provides for severance in proceedings where a defendant may be prejudiced by such joinder. Our judicial system should not condone any actions which subrogate the right of one defendant to those of another for the sake of expediency.

Defendant Beauchamp submits that in attempting to protect the rights of co-defendant, defendant Beauchamp was denied the right to a fair trial by having in effect his hands tied by the District Court's interpretation of the De Luna decision. References to defendant Beauchamp's honesty should have been permitted (R. 572). If there was any possibility of an unfavorable influence as to co-defendant's silence, then the District Court had the alternative to grant co-defendant a severance under Rule 14, FRCP. The District Court refused to pursue this alternative, thus resulting in clear prejudice to defendant Beauchamp by restraining his attempts to present his case to the jury.

Defendant Beauchamp submits that his rights as a defendant were not fairly or equally balanced with those of his co-defendants because of the District Court's overzealous interpretation of the De Luna case.

II

The second question on appeal is simply stated and as simply answered. The court in citing De Luna (R. 563) stated that,

> "—this Court is persuaded by the separate concurring opinion of Circuit Judge Ball,"

Citation to the authority of case law is the backbone of our legal system, but the majority opinion is the authority to be cited and all the rest is dicta.

The error is clear and at (R. 563) the prejudice obvious in that the severance was not granted and the appellant here was found guilty.

CONCLUSION

Based on a clear statement of the facts as they must be viewed in the light of the law, the defendant Beauchamp must be granted his appeal, no other course is just in the premises.

Respectfully submitted,

Edward Conrad Sawyer
Attorney for Appellant
Aubrey Wayne Beauchamp

CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing Brief were mailed this ____ day of November, 1971 to the U. S. Attorney, 300 Ainsley Building, 14 N. E. First Avenue, Miami, Florida 33132.

Edward Conrad Sawyer

APPENDIX E

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 71-2577

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

-vs-

PETER JOHN MILISCI, TOM CORBETT, PAUL WESCOTT KLINE, AUBRY WAYNE BEAUCHAMP, and ROYCE LEE BRINSON,
Defendant-Appellants.

PETITION FOR RE-HEARING
AND
MOTION FOR STAY OF MANDATE

EDWARD C. SAWYER
Attorney for Defendant
Aubry Wayne Beauchamp
3480 Main Highway
Miami, Florida 33133

COMES NOW the Appellant, AUBRY WAYNE BEAUCHAMP, by and through his undersigned attorney and pursuant to Rules 40 and 41 of the Federal Rules of Appellate Procedure respectfully files these his:

I. Petition for Re-Hearing,
and in the alternative,

II. Motion for Stay of Mandate,
and as grounds therefore would show;

I.

PETITION FOR RE-HEARING

1. It is the contention of the Petitioner that this Honorable Court is in error in it's interpretation of the Petitioner's argument by brief and oral argument with respect to the applicability of the 1970 Federal Comprehensive Drug Abuse Prevention and Control Act.

The Petitioner's right to be leniently sentenced under the new Act has been denied him and he has thereby been prejudiced because of the invalid inference that since the Petitioner was sentenced to a longer prison term than the five year minimum mandatory sentence, the lower court was determining that the minimum mandatory five year sentence was inapplicable or of no moment in the sentencing. It is Petitioner's contention that in fact the lower court was determining varying degrees of culpability in ordering a one year longer jail term for Petitioner than for codefendant Corbett or a six year lesser jail term for Petitioner than for codefendant Milisci. At the time of trial, the lower court apparently accepted as truth, testimony to the effect that the defendant Corbett was seasick much of the time during the ocean voyage from Grand Cayman to Jamaica, and therefore the trial court was disposed to deal less harshly with Corbett than with the two other defendants, who were aboard the boat,

"Cayman Pilot". The trial court, in the course of sentencing, apparently found Kline and Beauchamp slightly more culpable in their acts than was Corbett, and so finding, the court sentenced the defendants Beauchamp and Kline to a jail term of one year more than the jail term given to Corbett. The Court found maximum culpability in Milisci, perhaps because the jury found him guilty of criminal activities while he was on probation arising from criminal acts of similiar nature that had occurred sometime previous. The Court had no alternative but to sentence Corbett to five years, as no lesser sentence was possible, and determining that other defendants might have been more culpable than Corbett, the Court's only alternative course in the premises was to give longer jail terms to those defendants who, in the Court's eyes, were more culpable, and the longest jail sentence to that co-defendant who was, in the Court's eyes, most culpable.

Feeling himself bound by the jury's finding of guilt, and the statutory mandatory five year minimum sentence, the Honorable Judge King, in the trial court, had no alternative to the five year sentence give Corbett, and having determined varying degrees of culpability for the other defendants, the trial court, in fact, sentenced Beauchamp, Petitioner here, to only one year more than the absolute minimum sentence that could be given.

Had the lower court been persuaded that the 1970 Act might be applied in the instant case, it is emminently conceivable that Corbett would have been sentenced to a lesser jail term, or perhaps even probation, and co-defendants determined by the Court to be slightly more

culpable than Corbett, might well have received jail terms slightly in excess of Corbett's term, yet not approaching six years.

It must be the fact that prosecution is complete with judgement and sentence. Section 109, 1 U.S. Code, and Section 1103(a) of the 1970 Act, prejudice your Petitioner by denying him equal protection under the law, and his right to due process under the law as guaranteed by the Constitution, Fourteenth and Fifth Amendments.

Your Petitioner's contention is on all fours with the cases U.S. v. Stevens, 449 F.2nd 103, (9th Cir. 1971), and very similiar to the facts in U.S. v. Bradley, 455 F.2nd 1181, (1st Cir. 1972). The Bradley case has yet to be decided by the United States Supreme Court, and pending the outcome of said case, to suffer Petitioner Beauchamp to be interned in the Federal Penitentiary would be more criminal than any criminal act the jury in the lower court found him guilty of.

The lower court, in finding itself bound by the old sentencing structure rather than the new, prohibited the possibility of probation or parole. The older law, passed by a Legislature less knowledgable of the dangers of the respective drugs being legislated against, thought Cannabis much greater a threat than it has proven to be, a more enlightened Legislature has proclaimed Cannabis to be less harmful, and the punishment for violation of statutes pertaining thereto much less severe.

2. It is your Petitioner's contention that his right to adequate counsel was not granted him in that Peti-

tioner's counsel was hamstrung by being curtailed in the trial court from using that most moving argument based on the fact that Petitioner took the witness stand, stated his understanding of the circumstances, and thereafter, although holding himself open to cross-examination, was never found to have been misstating facts or avoiding the truth. Petitioner's attorney was burdened with the same limitations that restrict a prosecutor from commenting on the fact of a defendant's failure to testify in that any comment by Petitioner's defense attorney on Petitioner's willingness to take the stand, would have been construed as an inference that Petitioner's codefendants did not choose to take the stand. Such limitation so crippled the scope of Petitioner's closing argument that the jury in fact was never truly enlightened to the extent Petitioner jeopardized his position by giving testimony in his own behalf.

Petitioner suggests that had he been on trial as a lone defendant, unemcumbered by guilt by association or any restriction against comment, that in any other case would have been lengthy, with reference Petitioner's willingness to take the stand, Petitioner would not now be required to file the instant Petition and Motion.

Your Petitioner respectfully requests that this Court consider the contentions above set forth in light of the opinion of this Honorable Court, and further in respect to the appellants briefs in this matter, and the record on appeal, and upon the due consideration reverse Petitioner's conviction herein, or reschedule this matter for additional oral argument.

II.

MOTION FOR STAY OF MANDATE

COMES NOW Movant AUBRY WAYNE BEAUCHAMP, and requests this Court withhold entry of order of Mandate in the above styled matter pending Movants application for Writ of Certiorari to the United States Supreme Court and as grounds would show:

1. Your Petitioner has requested his undersigned attorney to seek Certiorari in the United States Supreme Court.

2. The issued to be raised by Writ of Certiorari to the United States Supreme Court are of a great general interest and import to the Judiciary of the United States.

3. The Movant herein would restate his contentions as set forth in Petition for Re-Hearing covering two points, namely;

a) The discretionary right of the lower court to apply the terms and conditions of the 1970 Comprehensive Drug Abuse Prevention and Control Act, as said Act relates to the sentencing of one convicted of acts construed under said Act to be criminal when said acts were in fact performed prior to the effective date of said act, and were charged under the prior applicable law.

b) The right of a defendant who, in a trial of several defendants, takes the stand to comment on the fact that he himself did take the stand, or in the alternative such Defendant's right to have his trial severed from

the trial of codefendants who choose not to take the stand in their own behalf, to the extent that the Fifth and Fourteenth Amendments to the United States Constitution may be applicable to the Defendant's rights in the circumstances.

Petitioner, Movant hereby respectfully requests this Honorable Court reconsider it's holding in the above styled appellant case, and reverse the conviction of Petitioner previously affirmed or stay the issuance of it's Mandate herein, if said Petition for re-hearing shall be denied.

Respectfully submitted,

/s/ Edward C. Sawyer

EDWARD C. SAWYER
Attorney for Beauchamp
3480 Main Highway
Miami, Florida 33133

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed to the HONORABLE HAROLD F. KEEFE, Assistant United States Attorney, 300 Ainsley Building, Miami, Florida; ARTHUR MASSEY, ESQUIRE, 36 Northeast First Street, Miami, Florida; JOEL HIRSHORN, 1040 City National Bank Building, 25 West Flagler Street, Miami, Florida, this 31st day of August, 1972.

/s/ Edward C. Sawyer

EDWARD C. SAWYER

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-567

AUBREY WAYNE BEAUCHAMP, PETITIONER

v.

UNITED STATES OF AMERICA

No. 72-5528

TOM CORBETT, PAUL WESCOTT KLINE AND ROYCE LEE BRINSON, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

STATEMENT

After a jury trial in the United States District Court for the Southern District of Florida, petitioners and a co-defendant were convicted of conspiracy to import marihuana into the United States, in violation of 21 U.S.C. (1964 ed.) 176a. Petitioner Corbett was sentenced to imprisonment for five years, subject to

489-350—72

the provisions of 18 U.S.C. 4208(a)(2). The other petitioners were each sentenced to imprisonment for six years (Sent. Hear. 12, 5, 6, 32).[1] The court of appeals affirmed (Pets. App. A).

1. Co-conspirator Rosenstrauch testified for the government that about the first week of January 1971, at the solicitation of co-defendant Milisci,[2] he put up $3,000 in a venture whose exact nature was not then disclosed to him (Tr. 35–37). Shortly thereafter he was introduced to petitioner Kline and a man who was to be captain of a chartered vessel which would pick up marihuana in Jamaica and bring it to the United States. Arrangements were made for its reception on the Florida coast (Tr. 38–46). Later in the month, Rosenstrauch learned from one Prevette, who had arranged for chartering the boat, that it had sunk and that the parties who had been operating it had returned to the United States. Milisci and Rosenstrauch set about trying to find another boat (Tr. 46–49).

At Prevette's request, Narcotics Agent Roque, operating under an assumed name, agreed to furnish Milisci, Brinson and Prevette a boat at Grand Cayman Island to bring in approximately a ton and a half of marihuana from Jamaica (Tr. 204–211). Brinson introduced Roque to Corbett, Beauchamp and Kline[3] at Miami International Airport on February 13, 1971; they accompanied him to Grand Cayman to pick up the boat. During the flight Beauchamp told Roque that

[1] "Sent. Hear." refers to the hearing on sentencing and "Tr." to the trial transcript, which are being lodged with the Clerk of this Court.

[2] Milisci appealed, but is not a petitioner herein.

[3] The latter two were using assumed names.

the people on the boat would communicate with those at the pickup area in Jamaica by walkie-talkie, and that he had charted their course and had marked the spot for the pickup (Tr. 212–213).

After their arrival in Grand Cayman, Roque introduced Beauchamp to one Bethel, who was to be captain of the vessel used. Beauchamp and Bethel charted the course to be followed, discussed the amount of fuel needed, and made plans for the pickup (Tr. 213–215, 300–301). That evening, Roque discussed with Beauchamp and Kline their plans for loading the marihuana by use of canoes. Roque mentioned patrol boats, and Beauchamp said that on a prior trip the natives had loaded a ton of marihuana in twenty-five minutes (Tr. 216–217).

On the following afternoon, Corbett, Beauchamp, Kline and Bethel left for Jamaica (Tr. 218–219). Because he was ill, Corbett was in his bunk most of the trip. He told Bethel that he had been on drugs for the past four months, had been unable to work, and his earnings on this trip would help to get him back on his feet (Tr. 311–312). The boat arrived around midnight at the pickup point, but attempts to communicate with the party on shore were unsuccessful because the walkie-talkie was broken. The boat cruised the pickup area for four hours, until rising surf caused it to run aground. After getting it free, the four men returned to Grand Cayman (Tr. 313–319, 66).[4]

[4] Roque later met Rosenstrauch and Brinson at Prevette's apartment. They reported that they had had the marihuana ready to load at Jamaica, but had not seen the boat (Tr. 220–222).

2. A motion for mistrial was made on the ground that occurrences before February 11, 1971, involved another conspiracy and testimony relating thereto was inadmissible (Tr. 410–411). This motion was denied (Tr. 425–426, 462). The court, however, instructed the jury that Prevette's testimony, which it regarded as not particularly coherent or extensive, should be disregarded (Tr. 467–468).

Petitioner Beauchamp was the only defendant to testify. He explained that he went along on the trip only as a crew member (Tr. 484–486). He stated that after the boat was on its way to Jamaica, Bethel told him that the purpose of the trip was to pick up a half million dollars worth of "stuff" (Tr. 507). Unable to escape, he had removed a part from the walkie-talkie (Tr. 508–511). After the boat grounded, according to his account, he was able to free it and they headed back to Grand Cayman (Tr. 517–520).

ARGUMENT

1. The court of appeals correctly concluded that in this case the claim of entrapment as a matter of law "cannot be seriously made" (Pet. App. 9).[5] The law is clear that when government agents "merely afford opportunities or facilities for the commission of the offense" to persons ready and willing to engage in the unlawful conduct, there is no entrapment. *Sherman* v. *United States*, 356 U.S. 369, 372; *Sorrells* v. *United States*, 287 U.S. 435, 441–442; *Lewis* v. *United States*, 385 U.S. 206, 209. The boat which petitioners unwit-

[5] References to the opinion of the court of appeals are to the Appendix in the printed petition of Beauchamp, No. 72-567.

tingly engaged through a government agent was just such a facility. Rather than constituting entrapment as a matter of law, the evidence summarized above would have justified the court in refusing to give an entrapment instruction. *Lopez* v. *United States*, 373 U.S. 427, 434–435. In fact, the issue was submitted to the jury on an instruction to which there has been no exception.[6]

2. Petitioner Beauchamp contends that he was improperly deprived of his rights because his trial counsel was not permitted to comment to the jury regarding the failure of the other defendants to take the witness stand. This claim is not well taken. The trial court carefully and properly instructed the jury regarding the right of a defendant to testify or not (Tr. 657–659). As the court below put it (Pet. App. 8–9):

> As we read the record, following considerable colloquy, the trial court's limitations made it permissible for counsel to argue to the jury that Beauchamp testified as a witness and they were to be the judges of his demeanor and the truth or falsity of his testimony as a witness. The court merely prohibited counsel from drawing any contrast between Beauchamp's giving

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[6] *United States* v. *Russell*, 459 F. 2d 671 (C.A. 9), certiorari granted, October 16, 1972, No. 71–1585; *United States* v. *Bueno*, 447 F. 2d 903, 905–906 (C.A. 5); and *United States* v. *Chisum*, 312 F. Supp. 1307 (C.D. Cal.), relied upon by petitioners in No. 72–5528, are inapposite. In all of these cases the contraband upon which the charges were based, or an ingredient of the contraband, was furnished by the government. Whatever may be the determination of the Court in *Russell*, it would furnish no basis for reversal of the convictions here. Accordingly, there is no reason to defer disposition of this case until *Russell* is decided.

testimony and the other defendants failing to do so. We conclude that this fully meets the requirements that the rights of the co-defendants must be balanced by the court in such a situation as this.[7]

3. The record does not support the contention of petitioners Corbett, Kline and Brinson that there were two separate conspiracies. On the contrary, Rosenstrauch's testimony was that co-defendant Milisci asked him in early January 1971 to invest a substantial sum to charter a boat to bring a large quantity of marihuana from Jamaica to the United States. In the course of events, Rosenstrauch met Kline and Prevette, the boat was chartered, but then sank. Rosenstrauch and Milisci therefore tried to procure another vessel, which was offered to them on favorable terms through the involvement of Roque (Tr. 35–49).

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[7] Petitioner Corbett alleges that the decision of the other defendants to rely on the defense of entrapment forced him to abandon his plea of not guilty and plead entrapment (Pet. No. 72–5528, 14–15). In fact, there was no abandonment of plea, and his contention that he was not involved in the conspiracy was argued forcefully to the jury (Tr. 631, 635–636).

Petitioners Corbett, Kline and Brinson contend that the district court abused its discretion in refusing to grant a severence in light of petitioner Beauchamp's decision to testify, since his testimony constituted a confession which they could not rebut without testifying themselves, and concerning which cross-examination by their attorneys would have elicited perjured testimony in violation of professional ethics. In fact, the testimony was not a confession but a total denial of participation in any conspiracy, which, if believed, tended primarily to incriminate Bethel, Roque, and Milisci, rather than petitioners herein. The contention that fear of eliciting perjured testimony prevented cross-examination is ingenious, but hardly excuses the failure to cross-examine a witness whose testimony was allegedly damaging to petitioners' defense.

That the indictment limited the time period of the conspiracy charged did not restrict the jury from considering the above evidence, including events before that period, which was relevant to show intent, purpose or a common scheme. Moreover, this evidence was highly material to rebut the claim of entrapment, which necessarily and properly makes the defendant subject to an "appropriate and searching inquiry into his own conduct and predisposition" as bearing on the claim of innocence. *Sherman* v. *United States*, 356 U.S. at 373; *Sorrells* v. *United States*, 287 U.S. at 451.

4. The district court imposed sentences of six years' imprisonment on all petitioners except Corbett, thus conclusively showing that the length of sentence which it felt was suitable in the circumstances was not determined by the minimum fixed by 21 U.S.C. (1964 ed.) 176a. Accordingly, a decision by this Court reviewing *United States* v. *Bradley*, 455 F.2d 1181 (C.A. 1), certiorari granted, 407 U.S. 908, cannot affect the length of the sentences imposed on these petitioners. If the Court should determine in *Bradley* that persons sentenced under the old statute should in fact have been sentenced under the new statute and thus are eligible for probation or parole, that determination would not require resentencing in this case.

On the other hand, petitioner Corbett was sentenced to the mandatory minimum sentence under Section 176a, with eligibility for parole pursuant to 18 U.S.C. 4208 (a)(2).[8] This sentence thus presents the questions in-

[8] It is our view, as set out more fully in our brief in *Bradley*, that parole is not available to persons convicted of narcotics offenses committed before the effective date of the Comprehensive Drug Abuse Control Act.

volved in *Bradley* and therefore we believe it appropriate for this Court to defer disposition of Corbett's petition until *Bradley* is decided.

CONCLUSION

It is therefore respectfully submitted that the Court should deny certiorari as to all petitioners except Corbett. Since the propriety of the sentence imposed upon him may depend upon the decision to be made in *Bradley* v. *United States*, his petition should be held until such determination is made.

ERWIN N. GRISWOLD,
Solicitor General.

NOVEMBER 1972.

U.S. GOVERNMENT PRINTING OFFICE: 1972